



The Comptroller General
of the United States

Washington, D.C. 20548

Mr. Walcott

Decision

Matter of: Jay-Em Corporation--Reconsideration

File: B-226386.2

Date: April 13, 1987

DIGEST

Prior dismissal is affirmed where protester knew of the basis for its protest more than 10 days before filing protest with General Accounting Office.

DECISION

Jay-Em Corporation requests that we reconsider our decision in Jay-Em Corp., B-226386, March 16, 1987, 87-1 C.P.D. "____", in which we dismissed as untimely its protest against Army--Tank Automotive Command request for proposals (RFP) No. DAAE07-86-R-B203. We affirm our dismissal.

The RFP was issued on October 15, 1986, and sought offers on four line items. Jay-Em submitted a price on each of the four solicited items. On January 16, 1987, after best and final offers (BAFO's) had been requested and received, Jay-Em was awarded a contract for line items 1, 2 and 3.

On February 2, the Army orally informed Jay-Em that it would be requesting a second round of BAFO's for line item 4.^{1/} On February 9, the Army confirmed in writing the request for the second round of BAFO's. Responses were due by 3 p.m. on February 27. Jay-Em filed its protest with our Office the morning of February 27.

^{1/} Line items 3 and 4 were for the same National Stock Number, but item 3 was restricted to domestic firms while both foreign and domestic firms could compete for item 4. According to the protester, when it was advised by the agency on February 2 that a second BAFO was being requested, it asked why and was told that there was uncertainty as to whether a foreign firm's offer was on an f.o.b. origin or destination basis.

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In its protest, Jay-Em stated:

"It is Jay-Em Corporation's contention and basis for protest that this second best and final offer violates the provisions of [the Federal Acquisition Regulation] . . . "

One provision of the Federal Acquisition Regulation (FAR) to which Jay-Em refers states that agencies should allow offerors an opportunity to submit new or amended proposals only when it is able to do so without disclosing proprietary information of another offeror. FAR, 48 C.F.R. § 15.606(c) (1986). The other provision prohibits contracting personnel from engaging in auction techniques, for example, furnishing information about other offerors' prices. FAR, 48 C.F.R. § 15.610(d)(3).

In our prior decision, we recognized that generally, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986), protests based upon alleged improprieties in a solicitation which are apparent prior to the bid opening or the closing date for receipt of initial proposals must be filed prior to bid opening or the closing date. In procurements where proposals are requested, alleged improprieties which do not exist in the initial solicitation must be protested prior to the next closing date. Jay-Em's protest to our Office would be timely under this standard.

In this case, however, we found that Jay-Em's protest against the contracting agency's decision to issue the amendment calling for a second BAFO did not fall under the above stated rule. Jay-Em's argument was that because an award already had been made to it for part of the requirement before second BAFO's were solicited, its prices were public knowledge and its competitive position jeopardized. It was our view that the mere fact that the agency had issued another request for BAFO's, which would permit other offerors to revise their prices based on Jay-Em's prices, was the basis of Jay Em's protest and, thus, Jay-Em knew its basis of protest when it was advised of the issuance of the amendment. Under these circumstances, we concluded that this protest falls under section 21.2(a)(2) of our Bid Protest Regulations, which requires that a protest "shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier."

The record indicates that Jay-Em knew of the basis for its protest no later than February 9, 1987, when Jay-Em acknowledged, in a letter to the Office of Senator John Glenn, that it had received notification on February 2 of the agency's intent to issue the second BAFO request. Since we have held

that oral notification of a basis of protest is sufficient to start the 10-day period running, we found the protest was not timely filed within 10 days after Jay-Em knew its basis of the protest.

In requesting reconsideration, Jay-Em now argues that the basis of its protest was not the issuance of the request for BAFO's but rather the publication of its contract prices in the Commerce Business Daily. It argues:

" . . . Jay-Em Corporation could not conclude that the information was publicly available until the Commerce Business Daily published the award on February 19, 1987. . . ."

We find no merit in this argument. As Jay-Em expressly recognized in its initial protest, the information concerning the contract became available to the public at the time the contract was awarded on January 16. FAR, 48 C.F.R. § 5.301, et seq. Accordingly, its basis for protest is that the agency permitted offerors to change their proposals after Jay-Em's prices were available to competing offerors. In fact, the initial protest to our Office was not based on the publication in the Commerce Business Daily. The protester stated:

"In this particular case, all offerors have knowledge or are capable of obtaining Jay-Em's prices for line item 4 by reviewing the contract issued January 16, 1987, which contains Jay-Em's prices for both [the awarded items] and the unawarded line item 4. In addition, award info was published in the [Commerce Business Daily] dated February 19, 1987." [Emphasis added.]

The protest was based primarily on the availability of the pricing information since January 16. In our view, the subsequent publication of the information did not alter the information's prior availability and if and when its competitors actually learned of Jay-Em's prices does not affect the time when Jay-Em knew its basis of protest. Accordingly, we affirm our decision that Jay-Em did not meet the requirements of 4 C.F.R. § 21.2(a)(2) in that it did not file its protest within 10 days after it knew of the basis therefor.

Finally, Jay-EM asks that we invoke 4 C.F.R. § 21.2(c), under which we will consider an untimely protest if it involves a matter of widespread significance to the procurement community. This "significant issue" exception to our timeliness rules is used sparingly so that the rules do not

become meaningless, and will only be invoked where the subject matter of the protest is of widespread interest or importance to the procurement community and involves a matter that has not been considered in a previous decision. Radiation Systems, Inc.--Request for Reconsideration, B-222585.6, Sept. 11, 1986, 86-2 C.P.D. ¶ 285. We do not find Jay-Em's protest to fall within the meaning of this exception. Although the facts presented here are somewhat unusual, we do not believe the matter is of widespread importance to the procurement community since it does not involve a question which, if resolved, would benefit parties other than the protester. See Taurio Corp., B-219008.2, July 23, 1985 85-2 C.P.D. ¶ 74.

Our prior dismissal is affirmed.

Jan *Jayneon Efrs*
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General Counsel